

1 Mark I. Harrison, No. 001226  
2 OSBORN MALEDON  
3 2929 North Central Avenue  
4 Twenty-First Floor  
5 Phoenix, AZ 85012-2793  
6 Phone: (602) 640-9324  
7 Fax: (602) 640-9050  
8 Email: mharrison@omlaw.com

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10 **IN THE SUPREME COURT**  
11 **STATE OF ARIZONA**

12 In the Matter of: ) Supreme Court No. R-11-0033  
13 )  
14 PETITION TO AMEND ER 3.8 OF ) **COMMENT OF LAWYERS IN**  
15 THE ARIZONA RULES OF ) **SUPPORT OF PETITION TO**  
16 PROFESSIONAL CONDUCT (RULE ) **AMEND ER 3.8 OF THE**  
42 OF THE ARIZONA RULES OF ) **ARIZONA RULES OF**  
SUPREME COURT) **PROFESSIONAL CONDUCT**

17 Pursuant to Rule 28 of the Arizona Rules of Supreme Court, the  
18 undersigned attorneys hereby file this comment in response to the Petition to  
19 Amend Ethical Rule (ER) 3.8 of the Arizona Rules of Professional Conduct and  
20 this Court's staff draft ("proposed rule"), which is based on the petition,  
21 resulting comments, and the rules of other states. For the reasons that follow,  
22 we support the Court's proposed rule but suggest the limited modifications set  
23 forth and explained below.

24 In response to the 300 (and counting) DNA exonerations and to the lack  
25 of guidance currently supplied by the Model Rules of Professional Conduct in  
26 likely cases of wrongful convictions, the Criminal Justice Section of the ABA,  
27 together with ten additional organizational co-sponsors, petitioned the ABA

1 House of Delegates to amend Model Rule 3.8 in 2008. The amendment  
2 overwhelmingly passed the House of Delegates *without any opposition or*  
3 *debate*. Moreover, although its suggested language differs in several respects,  
4 the Board of Governors for the State Bar of Arizona voted *unanimously* last  
5 month to urge this Court to adopt a rule requiring prosecutors to disclose  
6 evidence of wrongful convictions and, in appropriate circumstances, to inquire  
7 into the conviction and seek to vacate it.

8 We comment now to support the ABA's amendment and urge this Court  
9 to adopt it, as judiciously modified in the Petition.<sup>1</sup> Because this Court's draft  
10 of the proposed rule incorporates the essence of the ABA's amendment, we  
11 likewise support this Court's proposed rule and commend the Court for its  
12 attention to this issue.

13 Our additional comments track the five questions in this Court's order of  
14 August 30, 2012.

15  
16 **(1) What criteria should trigger the prosecutor's ethical duty to**  
17 **disclose exculpatory information after a conviction? Should it be**  
18 **"new, credible and material information," "credible and material**  
**information," or some alternative phrasing of the criteria?**

19 We support both the ABA's language and this Court's proposed  
20 language, which we believe to be substantively the same.<sup>2</sup>

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22 <sup>1</sup> The modifications in the Petition were borrowed largely from the  
23 amendment to the rule adopted in Colorado and are limited to helpful  
clarifications of certain words and terms used in the ABA's amendment.

24 <sup>2</sup> In this regard, we note that Arizona prosecutors have operated for three  
25 decades under ER 3.8(d)—which requires broader disclosure of mitigating  
26 evidence pre-sentencing—and the undersigned attorneys know of no instance in  
27 which that ethical rule has been unreasonably enforced against prosecutors or  
has otherwise hampered the administration of justice. Nor are we aware of any

**(2) Should this Court retain or delete the prosecutor’s duty, upon receipt of exculpatory information after a conviction, to “undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit”?**

If a prosecutor learns of “new, credible, and material evidence that the prosecutor knows creates a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted,” of course the prosecutor should look into the matter. Thus, the prosecutor whose office obtained the conviction should have a duty to investigate the matter further or to make reasonable efforts to cause a law enforcement agency to do so. MODEL RULES OF PROF’L CONDUCT R. 3.8(g). Moreover, in response to this proposed rule, prosecutors have stated that, when faced with strong evidence that an innocent person may have been convicted, they would indeed review the matter to determine whether the person is, in fact, innocent. Therefore, placing this obligation in the ethical rules should not cause problems for prosecutors (who, by their own account, would already act accordingly).

enforcement issues in the eight states that have already adopted the ABA’s amendment in whole or part, and all eight states use a disclosure standard similar to the ABA’s amendment. Finally, we note that the Board of Governors unanimously supports a broader disclosure standard, which would require prosecutors to disclose any “information that a convicted defendant did not commit an offense of which the defendant was convicted.”

1        Thus, this Court should adopt the portion of the Model Rule that requires  
2 prosecutors to investigate the matter or request an investigation. Because the  
3 word “investigate” has caused unnecessary controversy, however, we would  
4 support in the alternative the language in the Washington Rules of Professional  
5 Conduct: When the prosecutor learns of evidence creating a reasonable  
6 likelihood that an innocent person in the prosecutor’s jurisdiction has been  
7 wrongfully convicted, the prosecutor shall “make reasonable efforts to inquire  
8 into the matter, or make reasonable efforts to cause the appropriate law  
9 enforcement agency to undertake an investigation into the matter.” WASH. R.  
10 PROF’L CONDUCT R. 3.8(g)(2)(B).<sup>3</sup>

11        **(3) Should the prosecutor’s duty be different depending on whether**  
12 **the conviction was obtained in the prosecutor’s jurisdiction or**  
13 **outside that jurisdiction?**

14        We support the distinction recognized in both the ABA’s amendment and  
15 the Court’s proposed rule. The prosecutor whose office obtained the conviction  
16 should be the one obligated to inquire into the likely wrongful conviction and, if  
17 warranted, to seek to vacate the conviction.

18        **(4) Should the duty to disclose exculpatory information be extended**  
19 **to all lawyers, as proposed in at least one other U.S. jurisdiction?**

20        We support the proposed rule, which reflects the careful drafting and  
21 placement of the ABA’s amendment. Prosecutors are ministers of justice  
22 whose responsibilities differ significantly from lawyers representing private  
23 clients, and prosecutors often receive, or have access to, information to which  
24 other lawyers are not privy. Prosecutors, moreover, play an influential role in

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26 <sup>3</sup> We note that the Board of Governors similarly supports this language,  
27 although it suggests that the language be placed in the official comment to the  
28 rule.

1 determining whether, when, and under what terms an innocent person is  
2 released from prison. We have no opposition to proposed ER 3.10, provided  
3 that ER 3.10 would be adopted in addition to the proposed rule governing  
4 prosecutors.

5  
6 **(5) Should the Court retain or eliminate the prosecutor’s duty, not**  
7 **only to disclose exculpatory information, but to take affirmative**  
8 **steps to “remedy the conviction”?**

9 When a prosecutor knows of clear and convincing evidence that a person  
10 in the prosecutor’s jurisdiction did not commit the crime of which that person  
11 was convicted, the prosecutor’s greatest duty at that point is to correct this  
12 injustice. Removing proposed ER 3.8(h), then, would run contrary to the  
13 prosecutor’s duty, send the wrong message to Arizona prosecutors, and create  
14 the risk that a wrongful conviction would not be promptly addressed or  
15 remedied despite the presence of evidence that the convicted person did not  
16 commit the crime. The Board of Governors supports this Court’s proposed  
17 requirement to “set aside the conviction.” We support the formulations (i.e.,  
18 “remedy the conviction” or “set aside the conviction,” respectively) of both the  
19 ABA and this Court and urge the Court to adopt either formulation.

20 **CONCLUSION**

21 The Court should adopt its proposed rule and reincorporate the “inquiry”  
22 requirement. Wrongful convictions regrettably occur in the criminal justice  
23 system, and Arizona’s ethics rules currently provide very little post-conviction  
24 guidance to prosecutors. As noted in the Petition, these amendments pay  
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26  
27  
28

1 overdue attention to the second half of the prosecutor’s “twofold aim”—“that  
2 guilt shall not escape *or innocence suffer*.”<sup>4</sup>

3 **RESPECTFULLY SUBMITTED** this 20th day of May, 2013.

4  
5 By /s/ Mark I. Harrison  
6 **Mark I. Harrison, Esq.**  
7 OSBORN MALEDON\*

8 /s/ Terry Goddard  
9 **Terry Goddard, Esq.**  
10 SNR DENTON\*

11 /s/ Grant Woods  
12 **Grant Woods, Esq.**  
13 GRANT WOODS LAW\*

14 /s/ Stanley G. Feldman  
15 **Chief Justice Stanley G. Feldman (ret.)**  
16 HARALSON MILLER PITT FELDMAN &  
17 MCANALLY PLC\*

18 /s/ Charles E. Jones  
19 **Chief Justice Charles E. “Bud” Jones (ret.)**

20 /s/ Robert D. Myers  
21 **Hon. Robert D. Myers (ret.)**

22 /s/ Thomas A. Zlaket  
23 **Chief Justice Thomas A. Zlaket (ret.)**

24 <sup>4</sup> *Berger v. United States*, 295 U.S. 78, 88 (1935) (emphasis added). As  
25 this Court has noted, the “prosecutor’s interest in a criminal prosecution is not  
26 that it shall win a case, but that justice shall be done.” *In re Peasley*, 90 P.3d  
27 764, 772–73 (Ariz. 2004) (internal quotation omitted).

28 \* Institutional designations are for identification purposes only.

1 Electronic copy filed with the Clerk  
2 of the Supreme Court of Arizona  
3 this 20th day of May, 2013.

4 Copies of this Comment mailed  
5 this 20th day of May, 2013, to:

6 Larry Hammond  
7 ARIZONA JUSTICE PROJECT  
8 c/o Sandra Day O'Connor College of Law  
9 PO Box 875920  
10 Tempe, Arizona 85287-5920  
11 Email: lhammond@omlaw.com

12 Keith Swisher  
13 PHOENIX SCHOOL OF LAW\*  
14 One North Central Avenue  
15 Phoenix, Arizona 85004  
16 Email: kswisher@phoenixlaw.edu

17 Karen Wilkinson  
18 OFFICE OF THE FEDERAL PUBLIC DEFENDER\*  
19 850 West Adams Street  
20 Phoenix, Arizona 85007-2730  
21 Email: Karen\_Wilkinson@fd.org

22 *Petitioners*

23 /s/ Joni J. Jarrett-Mason  
24 4884709